UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 07-6053

HERBERT S. MONCIER,

Defendant-Appellant

Appeal from the United States District Court
for the Eastern District of Tennessee at Greeneville. No.
07-00040 - J. Ronnie Greer, District Judge.

Argued: March 12, 2009

Decided and Filed: July 8, 2009

Before: DAUGHTREY, ROGERS, and KETHLEDGE,
Circuit Judges

COUNSEL

ARGUED: Ralph E. Harwell, Law Offices of Ralph E. Harwell, Knoxville, Tennessee for Appellant. Robert M. Reeves, ASSISTANT UNITED STATES ATTORNEY, Greeneville, Tennessee for Appellee. **ON BRIEF:** Ralph E. Harwell, LAW OFFICES OF RALPH E. HARWELL, Knoxville, Tennessee, for Appellant. Robert M. Reeves, ASSISTANT UNITED STATES ATTORNEY, Greeneville, Tennessee, for Appellee. Stephen Ross Johnson, Wade V. Davies, RITCHIE, DILLARD & DAVIES, P.C. Knoxville, Tennessee, Caryll

S. Alpert, TENNESSEE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, Nashville, Tennessee, for Amicus Curiae.

OPINION

KETHLEDGE, Circuit Judge. Attorney Herbert Moncier appeals his conviction for criminal contempt relating to his conduct during a sentencing hearing before Judge Ronnie Greer. Although we reject all but one of Mr. Moncier's arguments, that one requires us to vacate his conviction and remand for a new trial.

I.

A.

This case arises from Mr. Moncier's representation of three potential defendants - Michael Gunter, Michael Vassar, and Harold Grooms - in connection with a federal drug investigation in Tennessee. Gunter and Vassar were tried together in the Eastern District of Tennessee, but Grooms remained unindicted during the time relevant to this appeal. On March 17, 2006, Judge Ronnie Greer conducted a hearing on the question whether Mr. Moncier's representation of Gunter and Vassar presented a conflict of interest for him. That hearing rand more than five hours. During the hearing, Moncier accused the government of "scurrilous" behavior, accused Judge Greer and the assigned Magistrate Judge of bias, and talked over Judge Greer to the point where, for "the first time" since he had "been on the bench[,]" Judge Greer resorted to the gavel to restore order. Judge Greer eventually disqualified Mr. Moncier from his representation of Gunter, finding an unwaivable conflict of interest. Gunter and Vassar were thereafter jointly tried and convicted, with Mr. Moncier representing Vassar.

Mr. Moncier then proceeded to file 43 post-verdict motions on Vassar's behalf. They included: "Motion for Presentence [sic] Hearing Conference to Determine Disputed and Contraverted [sic] Sentencing Issues To [sic] For Which the Court May Be Disqualified From Making Factual Findings[,]" "Motion For An Order To The United States Attorney To Deliver To The Court Documents And Reports Subpoened [sic] For The Sentencing Hearing For the Defense To Inspect To Prepare For The Hearing [,]" " Motion To Sentence Under § 3553 And § 3553(A)(2)[,]" "Motion for Relief from Prosecutorial Sentencing Misconduct, Vindictiveness, Unconstitutional and Selective Guideline Sentence Customs and Practices[,]" and "Third Motion for § 3553(a)(4)/Sentencing Guideline Departure/Variance; Unintended Post - *Booker* Consequences Pre-Mandatory Guideline Repeal of Parole Sentence Alternative[.]" Judge Greer denied virtually all of the motions, which in numerous instances caused Mr. Moncier to file a "renewed" motion of essentially the same substance, which Judge Greer denied.

Judge Greer scheduled Vassar's sentencing hearing for October 28, 2006, which was before the date on which one of Vassar's co-conspirators was scheduled to be sentenced. For tactical reasons, Mr. Moncier wanted the co-conspirator to be sentenced first, and he therefore moved to adjourn Vassar's hearing on October 19 and again on October 26, citing his preference regarding the sentencing sequence and otherwise asserting that he needed more time to prepare for the hearing. Judge Greer denied the motions, but adjourned the hearing anyway, to November 17 - which still came before the co-conspirator's scheduled hearing - because another of his cases had created a conflict for the original hearing date. In the meantime, Mr. Moncier

filed another motion to adjourn, which Judge Greer denied, and then yet another, which Judge Greer did not rule upon because it was filed the night before the hearing.

B.

When Vassar's sentencing hearing began on November 17, Mr. Moncier announced that he had an "emergency matter" to discuss with the court, namely, a potential conflict of interest arising from his simultaneous representation of Vassar and Grooms. When asked to identify the basis for the conflict, Mr. Moncier at first demurred, requesting that "he be permitted to present this to [another] district court judge that will not be making factual findings to my client[.]" Before long, however, Mr. Moncier allowed that the basis was that the government had told him the day before that Grooms had implicated Vassar in certain drug transactions. Mr. Moncier then spoke at considerable length about why he thought an "independent attorney" should be appointed for Vassar to discuss with him whether he wished to retain Mr. Moncier as his lawyer for purposes of his sentencing. Mr. Moncier also suggested that Vassar's sentencing hearing - *i.e.*, the one then underway - be adjourned pending the resolution of the potential conflict.

After taking about a twelve-minute recess to consider the matter, Judge Greer denied Mr. Moncier's various requests. Judge Greer observed that "[t]o the extent, Mr. Moncier, that there is a possibility now that Mr. Vassar knows information about other people who may be clients of yours, you've known about that for months and months and months." Judge Greer also stated that 'I'm simply not willing to postpone this [sentencing hearing] on the basis that there now exists in your mind a conflict that should have been readily

apparent to you six or seven months ago." In response, Mr. Moncier stated that "I must request the court to permit me to withdraw from representing Mr. Vassar because *I cannot effectively advise Mr. Vassar as to how to proceed this morning at the sentencing hearing*[.]" (Emphasis added.)

Mr. Moncier then requested a bench conference out of Vassar's hearing, which Judge Greer reluctantly granted. During the conference Mr. Moncier asserted, among other things, that there was a "precalculated plan of the government . . . to sabotage Mr. Vassar's position" at the hearing; that "they [*i.e.*, the prosecution] don't want people to hire me to try my trials"; that the government was attempting "to attack Herb Moncier"; and that "I'm not going to walk into this trap." When judge Greer asked what he meant by the latter comment, the following exchange occurred:

Moncier: I mean if I have to sit there and remain [mute], I will sit there and remain [mute].

The Court: In other words, you wouldn't provide him a defense?

Moncier: I can't provide him a defense. It would be an ineffective assistance of counsel to do so. Everybody is walking into a 2255 in this situation.

Mr. Moncier then continued:

If my client has known something, as remote as it might be, that pertains to Harold Grooms, that is that Harold Grooms offered to give him some drugs, if he knows that, and if he understands that that is within these tings that the government was wanting, that he need to know that. *He* [i.e., Vassar] *isn't going to tell me if*

Harold Grooms said that because he knows I represent Harold Grooms.

(Emphasis added.)

At that point, Judge Greer expressed two concerns. First, he said, "Mr. Moncier, this is, I believe the fifth time in two weeks that you've attempted to get this sentencing hearing continued. What's really going on here? What's going on? To which Mr. Moncier responded: "What's going on here is that I think the government is trying to set me up . . . [B]ecause I have tried a number of cases successfully, including this case, because I have the reputation of trying cases against the government and not doing what they want in this community, they're coming after me."

Second, Judge Greer stated that "the one thing that causes me the most concern about this is . . . your statement that because you represent Harold Grooms, your client won't tell you the truth; and if that's the case, I need to do something about that." Mr. Moncier then began to backtrack but Judge Greer reiterated his concern and took a short recess to consider the issue. By that time the hearing had already consumed to and a half hours, all of which had been devoted to Mr. Moncier's potential conflict.

Upon returning, Judge Greer said he had given the conflict issue "a little more thought" and offered to "give each one of you an opportunity to briefly address it further, if you wish to do so." Mr. Moncier took that opportunity, speaking for nearly 15 minutes with little hindrance from Judge Greer. During that statement, Mr. Moncier reiterated his theory that the government had "set this up." But more important was Mr. Moncier's pirouette on the conflict issue; there was, it appears, not a conflict after all. In flat contradiction to

what he had said an hour earlier, Mr. Moncier stated that " I had absolutely and I have today no reason to believe that I have [an] actual conflict of interest between Harold Grooms and Michael Vassar, none, and I don't"; and further that "Mr. Vassar has also instructed me that he wants to go forward with sentencing today." Mr. Moncier then stated, no less than three times, that "Mr. Vassar wants to address the court" regarding his choice of counsel. *Id.*

Judge Greer wanted to speak to Vassar as well. But first he had some words for Mr. Moncier:

> Mr. Moncier, you just made some statements about what you know about this court's attitudes about you and the way you do things. There have been a number of occasions when I have complimented you in the open courtroom on the success you've had in defending criminal defendants in this court. Contrary to what you might see as some disappointment on my part when you get an acquittal, that's not the case. I've never been disappointed or upset when you've gotten an acquittal in this court, nor have I expressed an overall dislike on the way your present your cases.
>
> What I have said to you on numerous occasions is that I do not like the lack of civility that you bring to cases; that I do not like the lack of candor that you often bring to cases; that I do not like the fact that you on occasion misrepresent facts before a jury or before a witness; and I don't like the aspersions you cast, the personal aspersions that you cast at times upon the professional who oppose you, nor do I like the aspersions

you cast upon the court at times. You know very well that I did not approve of comments you made about the magistrate judge in this court in the pleadings you filed before this court. I do not like the fact that you'll make an argument before the jury that I sustained an objection to or, or instructed you not to make. That happened in Mr. Vassar's other case where I sustained an objection and you turned around and made the same argument again. That has absolutely nothing - none of that has absolutely anything at all to do with Mike Vassar's sentence out to be in this case.

You think the government is out to get you because you have success. You think the court is against you because you have success. Aside and apart from the egotistical implications that that statement contains, they're [sic] just simply wrong. I don't resent you the success you've had here. Every client - I've bent over backwards in this case from the very beginning to make sure that Mr. Vassar got the counsel of his choice in this case.

* * *

It does, however, bother me in the addition that you've told me in a side-bar conference this morning that if this hearing goes forward today, you intend to sit there at counsel table mute and render ineffective assistance of counsel of Mr. Vassar; and now you tell me that you're prepared to go forward, Mr. Vassar wants to go forward. Those are the kinds of things, Mr. Moncier,

that give me heartburn about your conduct. You' can't have it both ways.

Judge Greer then attempted to speak to Vassar, as Moncier had suggested.

The Court: Mr. Vassar, here's the court's concern. When we have this sentencing hearing I want your lawyer to ask whatever questions are necessary to ask to adequately present your case to this court. I don't want you represented by a lawyer who is reluctant to ask questions for - out of concern about what the answers might be as they relate to Harold Grooms. I don't want your lawyer to be in a position to where he is reluctant to call a witness for fear that the government might ask about Harold Grooms and he doesn't know what the witness is going to say. you understand what I'm saying?

Vassar: Yes, sir.

The Court: I want your lawyer's loyalty to be to you -

Vassar: That' what I want, your Honor.

The Court: -and nobody else.

Vassar: That's what I want.

The Court: Now you understand how those conflicts ca arise in the context of this case with Mr. Moncier representing Harold Grooms and representing you at the same time?

Vassar: I understand.

The Court: Okay. It's a very simple question then, understanding how those conflicts can arise, do you want Mr. Moncier to continue representing you in this case or do you want me to see if I can find somebody who has no connection with any other codefendant or potential codefendant in this case?

Moncier: Once again, you honor -

The Court: Mr. Moncier -

Moncier: He makes-

The Court: Mr. Moncier, you be quiet.

Moncier: May I approach the bench?

The Court: You may stand there and do what I told you to do until Mr. Vassar answers this question.

Moncier: For the record, you Honor, I object without him having-

The Court: Mr. Moncier, one more word and you're going to jail.

Moncier: May I speak to my-

The Court: Officers take him into custody. We'll be in recess.

C.

Judge Greer released Mr. Moncier less than an hour later, and stated that he would not summarily punish Mr. Moncier for criminal contempt under Fed. R. Crim. P. 42(c). Instead, at the request of Mr. Moncier's attorney, Judge Greer directed that the government formally charge Mr. Moncier with two counts of criminal contempt, pursuant to 18 U.S.C. §§ 401(1) and (3). Mr. Moncier thereafter moved to disqualify Judge Greer from the contempt trial, arguing that the charges "involved disrespect toward the court" within the meaning of Rule 42(a)(3). Judge Greer denied the motion.

Judge Greer presided over Mr. Moncier's contempt trial on April 24, 2007. The prosecution introduced the transcript of the November 17, 2006 hearing, and rested. Moncier then testified in his own defense, asserting that his recalcitrance was necessary to protect his client's rights. In a written decision five weeks later, Judge Greer found Moncier guilty of both charges. Judge Greer thereafter sentenced him to one year of probation and a $5,000.00 fine.

The appeal followed.

II.

A.

Mr. Moncier argues that his conviction should be reversed and the charges against him dismissed. Specifically, he argues that the evidence at trial was insufficient to support his conviction. Our review of this issue is limited to whether any rational finder of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The elements of criminal contempt are (1) that the defendant engaged in "misbehavior," (2) that the misbehavior obstructed the administration of justice, (3) that the misbehavior occurred in the presence of the court, and (4) that the defendant acted with "intent to obstruct" *Vaughn v. City of Flint*, 752 F.2d 1160, 1167 (6th Cir. 1985).

The record permits a finding of these elements here. Mr. Moncier indisputably misbehaved at the November 17, 2006 hearing, and that misbehavior obstructed the court's efforts not only to proceed generally with Mr. Vassar's sentencing, but also specifically to ask Mr. Vassar whether he wished to retain Mr. Moncier as counsel. And there is not doubt that the Mr. Moncier's obstruction was intentional. Mr. Moncier essentially admits as much, but contends he had good reason for the obstruction - namely, as he testified at trial and now argues to this court, that he had an *ethical duty* to obstruct Judge Greer's questioning of his client. The contention is beside the point, however, for purposes of determining whether the record support his conviction. It plainly did.

But the contention warrants comment in its own right. Mr. Moncier's contention, specifically, is that his "duty to confer and advise Vassar *necessarily include[d] potential obstruction of Judge Greer* questioning Vassar in the presence of the prosecution and FBI[.]" *Moncier Br.* at 5 (emphasis added). The Tennessee Association of

Criminal Defense lawyers makes much the same contention in its *amicus* brief supporting Mr. Moncier. The idea appears to be that, had Mr. Moncier not thrown himself across the tracks on November 17, Mr. Vassar's constitutional rights would have been violated. And thus, we are told, it was appropriate, and even necessary, for Moncier, rather than Judge Greer, to take control of the courtroom.

To all of which there is a simple answer: There is not right of revolution in a United States District Court. The lawyer's duty is not to defy the judge's orders, but to follow them. It is true enough that judges, like other humans, will make mistakes, and that those mistakes will sometimes be to the detriment of a client's rights. But that is what Circuit Courts exist to remedy. "Lawyers are required to obey even incorrect orders; the remedy is on appeal." *In re Dellinger*, 502 F.2d 813, 816 (7th Cir. 1974). We entirely agree with Judge Greer that "someone must be in control of what happens in a courtroom[,]" and that the someone is "the trial judge, not the lawyer for a criminal defendant nor the lawyer for the United States." *May 30, 2007 Opinion and Order* at 23.

We therefore reject Mr. Moncier's arguments for reversal of his conviction and dismissal of the charges against him.

B.

Mr. Moncier next argues that his conviction and sentence should be vacated, and the case remanded for trial before a different district court judge. Mr. Moncier bases this argument on Fed. R. Crim. P. 42(a)(3), which provides that, "[i]f the criminal contempt involves disrespect toward or criticism of a judge, that judge is disqualified from presiding at the contempt trial or

hearing unless the defendant consents." Here, Mr. Moncier's refusal to allow Judge Greer to question his client was the final event giving rise to the charge of contempt. In a contempt case, however, "the final event in an unfortunate chain of occurrences [cannot] be realistically considered apart from what went before." *United States v. Combs*, 390 F.2d 426, 430 (6th Cir. 1968). We therefore consider whether Mr. Moncier's final recalcitrance was disrespectful towards Judge Greer when viewed in the context of the record as a whole.

Judge Greer himself commented several times on that record. In addressing Mr. Moncier at the close of his contempt trial, Judge Greer stated that "the most bothersome aspect" of the case to him was "the accusations that have been made throughout the course of these proceedings that this court was somehow biased or prejudiced against either you or your client in the Vassar case; and as I indicated in the order [denying the motion to disqualify], those certainly are allegations that could have been found to be personally offensive to this court[.]" Judge Greer also admonished Mr. Moncier, correctly, that "[i]t doesn't make any difference who is sitting up here, the institution, the court, deserves to be treated with respect and decorum."

For two reasons, however, Judge Greer held that the charged contempt did not require his disqualification under Rule 42(a)(3). First, Judge Greer expressed a concern that, if construed to require his disqualification, the rule would "basically allow [] a criminal defendant to pick his or her trial judge" by acting contemptuously towards any judge whom the defendant did not want to preside over his or her case. That would be true, however, only with respect to the contempt charge, not for any underlying (and likely

more serious) charge for which the defendant is prosecuted. And in any event the rule says what it says.

Second, the record makes clear that Judge Greer tried simple to rise above taking personal offense from Mr. Moncier's conduct towards him. In that regard, Judge Greer's finding that Mr. Moncier's conduct was not disrespectful towards him personally, in a manner requiring disqualifications, can be attributed less to an error of judgment, than to an excess of magnanimity. We take a less forgiving view of Mr. Moncier's conduct, and we conclude that, fairly, considered, it did involve disrespect towards Judge Greer within the meaning of the rule, with the ironic consequence that he gets a new trial.

The trial, however, should be unencumbered by any of the arguments in Mr. Moncier's brief to this court. We have considered all of those arguments, and with the sole exception of the one made under Rule 42(a)(3), we reject all of them on the merits.

Mr. Moncier's conviction and sentence are vacated, and the case remanded for trial before a different district court judge.

No. 07-6053

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA	)	
	)	
Plaintiff-Appellee,	)	
	)	ORDER
v.	)	
	)	
HERBERT S. MONCIER	)	
	)	
Defendant-Appellant	)	

FILED
September 24, 2009
LEONARD GREEN, CLERK

BEFORE: DAUGHTREY, ROGERS, and KETHLEDGE, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green
Clerk

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

December 15, 2009

Mr. Herbert S. Moncier
775 Bank of America Building
550 Main Avenue
Knoxville, TN 37902

Re: Herbert S. Moncier
v. United States
Application No. 09A581

Dear Mr. Moncier:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on December 15, 2009 extended the time to and including February 21, 2010.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk,

by

Ruth Jones
Case Analyst

EDTN Judgment in a Criminal Case (Rev. 3/04)
Sheet 1

United States District Court
Eastern District of Tennessee

UNITED STATES OF AMERICA
V.
HERBERT S. MONCIER

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 2:07-CR-40-001

Ralph Harwell & John T. Rogers
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s):___
[ ] pleaded nolo contendere to count(s) __ which was accepted by the court
[x] was found guilty on count(s) One after a plea of not guilty

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section

18USC 401(1)

Nature of Offense

Criminal Contempt

Date Offense Concluded

11/17/06

Count Number(s)

1

Title & Section

18USC 401(3)

Nature of Offense

Criminal Contempt

Date Offense Concluded

11/17/06

Count Number(s)

1

The defendant is sentenced as provided in pages 2 through 5 of this judgment and the Statement of reasons. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and 18 U.S.C. § 3553.

[ ] The defendant has been found not guilty on count(s)__

[ ] Count(s) ____ [] is [] are dismissed on the motion of the United States.

IT IS ORDERED, that the defendant shall notify the United States Attorney for the district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special

assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and the United States attorney of any material change in the defendant's economic circumstances.

8/27/07
Date of Imposition of Judgment

Signature of Judicial Officer

J. RONNIE GREER, United States District Judge
Name & Title of Judicial Officer

9/10/07
Date

EDTN Judgment in a Criminal Case (Rev. 3/04)
Sheet 4 - Probation

Judgment- Page 2 of 5

DEFENDANT: HERBERT S. MONCIER
CASE NUMBER: 2:07-CR-40-001

PROBATION

The defendant is hereby place on probation for a term of 1 year.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any

unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of placement on probation and at least two periodic drug tests thereafter, as determined by the court.

[x] The above drug testing conditions is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable)

[x] The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable)

[ ] The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable)

[ ] The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable)

[ ] The defendant shall participate in an approved program for domestic violence. (Check, if applicable)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of probation that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependants and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

EDTN Judgment in a Criminal Case (Rev. 3/04)
Sheet 4A - Probation

Judgment - Page 3 of 5

DEFENDANT: HERBERT S. MONCIER
CASE NUMBER: 2:07-CR-40-001

SPECIAL CONDITIONS OF SUPERVISION

1) You shall attend and complete an anger management class within 6 months.

2) You shall complete a 3 hour course of Ethics and Professionalism which shall be in addition to any other requirement and which shall be completed within 6 months from the date of this order.

3) You shall complete 150 hours of community service work.

4) This shall be a term of supervised probation only to the extent that the special conditions of probation be monitored.

EDTN Judgment in a Criminal Case (Rev. 3/04)
Sheet 5 - Criminal Monetary Penalties

Judgment - Page 4 of 5

DEFENDANT: HERBERT S. MONCIER
CASE NUMBER: 2:07-CR-40-001

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 6. The assessment is ordered in accordance with 18 U.S.C. § 3013.

Totals:

Assessment
$10.00

Fine
$5,000.00

Restitution
$

[ ] The determination of restitution is deferred until ___. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

[ ] The defendant shall make restitution (including community restitution) to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, if the United States is a victim, all other victims, if any, shall receive full restitution before the United States receives any restitution, and all restitution shall be paid to the victims before any restitution is paid to a provider of compensation, pursuant to 18 U.S.C. § 3664.

Name of Payee

* Total Amount of Loss

Amount of Restitution Ordered

Priority Order or Percentage of Payment

Totals: $___ $___

[ ] If applicable, restitution amount ordered pursuant to plea agreement $ ___

The defendant shall pay interest on any fine or restitution of more than $2500, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default pursuant to 18 U.S.C. §3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

[ ] The interest requirement is waived for the [ ] fine and/or [ ] restitution.

[ ] The interest requirement for the [ ] fine and/or [ ] restitution is modified as follows:

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1998 and before April 23, 1996.

EDTN Judgment in a Criminal Case (Rev. 3/04)
Sheet 6 - Schedule of Payments

Judgment - Page 5 of 5

DEFENDANT: HERBERT S. MONCIER
CASE NUMBER: 2:07-CR-40-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A [x] Lump sum payment of $5010.00 due immediately, balance due

[ ] not later than__, or
[ ] in accordance with [ ] C, [ ] D, or [ ] E or [ ] F below; or

B [ ] Payment to begin immediately (may be combined with [ ] C, [ ] D, or [ ] F below); or

C [ ] Payment in ____ (e.g., equal, weekly, monthly, quarterly) installments of $__ over a period of __ (e.g.,

months or years), to commence __ (e.g., 30 or 60 days) after the date of this judgment; or

D [ ] Payment in ____ (e.g. equal, weekly, monthly, quarterly) installments of $__ over a period of ___ (e.g., months or years), to commence __ (E.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E [ ] Payment during the term of supervised release will commence with O (e.g 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F [ ] Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. Unless otherwise directed by the court, the probation officer, or the United States attorney, all criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, shall be made to ***U.S. District Court, 220 W. Depot St., Suite 200, Greeneville, TN 37743.*** Payments shall be in the form of a check or a money order, made payable to U.S. District Court, with a notation of the case number including defendant number.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[ ] Joint and Several

Defendant Name, Case Number and Joint and Several Amount:

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution; (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

United States Department of Justice

United States Attorney
Eastern District of Tennessee

Please reply to the Greeneville Office

Headquarters
800 Market Street, Suite 211
Knoxville, Tennessee 37902
423/545-4167
FAX 423/545-4167

1110 Market Street, Suite 301
Chattanooga, Tennessee 37402
423/752-5140
FAX 423/752-5150

202 Sunset Drive, Suite 509
Johnson City, Tennessee 37604
423/282-1889
FAX 423/282-0840

220 West Depot Street, Suite 423
Greeneville Tennessee 37743
423/639-6759
FAX 423/63-6451

November 16, 2006

By facsimile telecopier and e-mail

Herbert S. Moncier, Esq.
550 Main Avenue, Suite 775
Knoxville, Tennessee 37902
Facsimile: (865)546-7746

Re: *United States v. Michael Vassar*
E.D. Tenn. Case No. 2:05-CR-75

Dear Mr. Moncier:

In accordance with the Court's oral order at th close of the hearing on November 15, 2005. I hav reviewed the FBI and TBI investigative files to determir if there is any information for which disclosure may b required under *Brady* or *Giglio* which has not alread been disclosed. A review of the reports revealed th following information concerning Mr. Vassar. None of th information appears to be exculpatory or mitigatin; however, the information is being disclosed in any ever in light of the defense's expansive reading of wha information you consider relevant to a sentencir determination.

> On March 28, 2002, Chris Shults advised agents that Mike Vassar was selling "hydros" (hydrocodone tablets) and cocaine. Shults stated that he believed and most of the transactions took place in Vassar's garage. Shults said he has been in Vassar's garage and in his home. Vassar is well known for "fixing cars." Vassar seems to enjoy having sex with 20 year old girls. Shults advised that Vassar trades cocaine to the girls for sex.
>
> On April 16, 2002, Chris Shults advised agents that Mike Vassar had one-half ounce or more of cocaine stored in the burglar alarm box at Vassar's garage.
>
> On April 25, 2002, Chris Shults advised agents that a man known as "Bledsoe" helped Mike Vassar on weekends at Vassar's garage next to Vassar's house dismantling and reassembling

stolen vehicles. Shults also stated that Vassar was selling cocaine to Darryl Burgin who works at Ray Hawk's auto salvage, H-1 Auto, every Friday. Shults also reported that Vassar had recently told Ray Hawk that Vassar had sold three air bags to an unknown male and that the unknown male had told law enforcement that he had purchased the air bags from Vassar; Vassar was inquiring of Hawk if the air bags could be traced back to any particular vehicle.

Michael Carl Vassar Letter to Mr. Moncier
E.D.Tenn 2-05-CR-75
November 16, 2006
Page 3

In October 2002, Chris Shults advised agents that Mike Vassar was purchasing "hydros" (hydrocodone tablets) from a third individual.

On November 4, 2002, Chris Shults advised agents that a third person was supplying Mike Vassar with hydrocodone, and another person was supplying Vassar and Vassar's girlfriend, Marcella Grooms, with hydrocodone.

On December 12, 2002, Chris Shults advised agents that a third person was supplying Mike Vassar with cocaine. The third person told Shults that he did not completely trust Vassar and was only doing smaller deals with him.

On March 18, 2003, Chris Shults advised agents that Pat Taylor was borrowing Mike Vassar's camping trailer and would be using it to go to the races in Bristol, Tennessee, during the weekend of March 21 through 23, 2003.

On November 2, 2004, Chris Shults advised agents that Mike Vassar was "on oxycontin bad."

On August 18, 2005, Chris Shults advised agents that Lynn Phillips had supplied cocaine to Mike Vassar, Shults, Mark Thornton, and to other persons.

On October 12, 2005, Mark Thornton advised agents that Thornton did not complete any drug transactions with Mike Vassar because Thornton feared Vassar had advised law enforcement about Thornton's trip to Myrtle Beach with Roger Gunter in May 2004 which resulted in Gunter's arrest. Thornton also related in the interview that Vassar had told Thornton, while they were both in custody in the Greene County Detention Center, that approximately two weeks before Vassar was arrested on August 10, 2005, Harold Grooms had contacted Vassar and indicated that he, Grooms would help Vassar in any way. Grooms also offered to supply Vassar with needed drugs. However, according to Vassar, he did not complete any drug transactions with Grooms prior to his arrest.

On July 6, 2006, Dewey Lynn Phillips was interviewed at the Washington County Detention Center. During a polygraph examination, Phillips was asked two test questions:

> (A)Concerning the $80,000 found at the traffic stop, was any of it drug money?
> (B)Did you use any drug money to finance any spec homes?

Phillips answered "no" to both questions and the examiner found the responses to the questions were indicative of deception. Phillips was advised of the results and re-interviewed. Phillips told agents that $40,000 of the approximately $80,000 cash seized from him by the Tennessee Highway Patrol in March 2005 was drug money he had received from Chris Shults, Mark Thornton, and Mike Vassar. Phillips admitted that he had previously lied to investigators about the source of the money. Phillips said most of the $40,000 came from Chris Shults with the rest coming from Thornton and Vassar. Phillips claimed that the remainder of the money belonged to Gilda Cuberson.

Sincerely,

JAMES R. DEDRICK
UNITED STATES ATTORNEY

By /s M. Neil Smith
Assistant United States Attorney

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT GREENEVILLE

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 2:05-CR-75
	)	
MICHAEL VASSAR	)	
	)	
In Re: HERBERT S. MONCIER	)	

NOTICE

It is hereby **ORDERED** that the trial of the criminal contempt charge against Herbert Moncier shall be held at 9:00 a.m. on Tuesday, April 24, 2007 at the James H. Quillen United States Courthouse in Greeneville, Tennessee and that Assistant United States Attorney Robert M. Reeves is appointed, pursuant to the provisions of *Fed. R. Crim. P.* 42(a)(2), as the prosecutor in the case. This will allow the defendant a reasonable time to prepare a defense.

SPECIFICATION OF THE CHARGE:

Count 1 - It is charged that Mr. Moncier's conduct in the course of a hearing held on November 17, 2006, in knowing violation of the clear and specific directions from the Court, interrupted the orderly process of the hearing. As set out in the transcript of that hearing, Mr. Moncier's disruptive conduct consisted of the following:

THE COURT: MR. VASSAR, HERE'S THE COURT'S CONCERN. WHEN WE HAVE THIS SENTENCING HEARING I WANT YOUR LAWYER TO ASK WHATEVER QUESTIONS ARE NECESSARY

TO ASK TO ADEQUATELY PRESENT YOUR CASE TO THE COURT. I DON'T WANT YOU REPRESENTED BY A LAWYER WHO IS RELUCTANT TO ASK QUESTIONS FOR - OUT OF CONCERN ABOUT WHAT THE ANSWERS MIGHT BE AS THEY RELATE TO HAROLD GROOMS. I DON'T WANT YOUR LAWYER TO BE IN A POSITION TO WHERE HE IS RELUCTANT TO CALL A WITNESS FOR FEAR THAT THE GOVERNMENT MIGHT ASK ABOUT HAROLD GROOMS AND HE DOESN'T KNOW WHAT THE WITNESS IS GOING TO SAY. YOU UNDERSTAND WHAT I'M SAYING?

MR. VASSAR: YES SIR.

THE COURT: I WANT YOUR LAWYER'S LOYALTY TO BE TO YOU -

MR. VASSAR: THAT'S WHAT I WANT.

THE COURT: NOW, YOU UDNERSTAND HOW THOSE CONFLICTS CAN ARISE IN THE CONTEXT OF THIS CASE WITH MR. MONCIER REPRESENTING HAROLD GROOMS AND REPRESENTING YOU AT THE SAME TIME?

MR. VASSAR: I UNDERSTAND.

THE COURT: OKAY. IT'S A VERY SIMPLE QUESTION THEN, UNDERSTANDING HOW THOSE CONFLICTS CAN ARISE, DO YOU WANT MR. MONCIER TO CONTINUE RPRESENTING YOU IN THIS CASE OR DO YOU WANT TO SEE IF I CAN FIND SOMEBODY WHO HAS NO CONNECTION WITH ANY OTHER CODEFENDANT OR POTENTIAL CODEFENDANT IN THIS CASE?

MR. MONCIER: ONCE AGAIN, YOUR HONOR -

THE COURT: MR. MONCIER -

MR. MONCIER: HE MAKES -

THE COURT: MR. MONCIER, YOU BE QUIET.

MR. MONCIER: MAY I APPROACH THE BENCH?

THE COURT: YOU MAY STAND THERE AND DO WHAT I TOLD YOU TO DO UNTIL MR. VASSAR ANSWERS THIS QUESTION.

MR. MONCIER: FOR THE RECORD, YOUR HONOR, I OBJECT WITHOUT HIM HAVING -

THE COURT: MR. MONCIER, ONE MORE WORD AND YOU'RE GOING TO JAIL.

MR. MONCIER: MAY I SPEAK TO MY-

THE COURT: OFFICERS TAKE HIM INTO CUSTODY. WE'LL BE IN RECESS.

(RECESS AT 12.47 P.M.)

SO ORDERED.

ENTER:

s/J. RONNIE GREER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRCT OF TENNESSEE AT
GREENEVILLE

UNITED STATES OF AMERICA	)	
	)	
v.	)	NO. 2:07-CR-40
	)	
HERBERT S. MONCIER	)	

MEMORANDUM OPINION AND ORDER

On August 9, 205, Michael Vassar ("Vassar") was indicted by the federal grand jury on charges of possession of cocaine with intent to distribute, being a felon in possession of ammunition, and distribution of cocaine. [Case No. 2:05-CR-70]. Vassar was indicted on September 13, 2005, on charges of conspiracy to distribute and possess with the intent to distribute five (5) kilograms or more of cocaine and distribution of cocaine. [Case No. 2:05-CV-75]. Vassar was represented at the trial of both cases by attorney Herbert S. Moncier ("Moncier").

This matter is before the Court on the issue of the alleged criminal contempt of Moncier on November 17, 2006, during his representation of Vassar in case No. 2:05-CR-75. The contempt matter was tried before the Court without intervention of a jury on April 24, 2007, and was taken under advisement for the purpose of making written findings of fact and conclusions of law.

FACTUAL AND PROCEDURAL BACKGROUND

On November 17, 2006, Michael Vassar was scheduled to be sentenced by this Court after his conviction by a jury in case No. 2:05-CR-75 of a conspiracy to distribute and to possess with the intent to

distribute cocaine. At the beginning of the hearing, Moncier, after informing chambers of an emergency matter to be taken up, stated that he had been supplied with a letter from the United States on the prior day "purporting to be a Brady disclosure." Representing to the court that the letter raised a possible issue pursuant to Rule 44 (c), Moncier asked "to address the Court with the government present on the record in chambers . . ." [Doc. 680, p.2][1]

After the Court cleared the courtroom of all present except for Moncier and Vassar, the government agent and the Assistant United States Attorneys representing the United States and certain court personnel, Moncier moved for a continuance of the sentencing hearing and that the matter be presented to another district judge and an independent attorney be appointed to advise Vassar concerning the Rule 44 matter. After considerable argument, these requests were denied.

Moncier then made various further attempts to postpone the sentencing hearing, including a motion to withdraw as counsel for Vassar and then to withdraw conditionally. These motions were then essentially withdrawn after Moncier informed the Court that his client wished to go forward with the hearing with Moncier representing him and that Vassar wished to

---

[1] The disclosure involved the statement of an already convicted co-conspirator, whom Moncier had subpoenaed to testify at the sentencing hearing, which suggested that Vassar knew incriminating information about another of Moncier's clients, Harold Grooms, alleged to be an unindicted co-conspirator. Moncier argued that independent counsel should be appointed to advise Vassar concerning the possible conflict of interest on Moncier's part created by his representation of both Vassar and the unindicted co-conspirator. Moncier asserted that Vassar would not be candid with him about the matter because of the joint representation, thus the need for independent counsel.

address the Court. At the end of a lengthy hearing, during the Court's questioning of Vassar, the following occurred:

> **THE COURT:** MR. VASSRA, HERE'S THE COURT'S CONCERN. WHEN WE HAVE THIS SENTENCING HEARING I WANT YOUR LAWYER TO ASK WHATEVER QUESTIONS ARE NECESSARY TO ASK TO ADEQUATELY PRESENT YOUR CASE TO THIS COURT. I DON'T WANT YOU REPRESENTED BY A LAWYER WHO IS RELUCTANT TO ASK QUESTIONS FOR - OUT OF CONCERN ABOUT WHAT THE ANSWERS MIGHT BE AS THEY RELATE TO HAROLD GROOMS. I DON'T WANT YOUR LAWYER TO BE IN A POSITION TO WHERE HE IS RELUCTANT TO CALL A WITNESS FOR FEAR THAT THE GOVERNMENT MIGHT ASK ABOUT HAROLD GROOMS AND HE DOESN'T KNOW WHAT THE WITNESS IS GOING TO SAY. YOU UNDERSTAND WHAT I'M SAYING?
>
> **MR. VASSAR:** YES, SIR.
>
> **THE COURT:** I WANT YOUR LAWYER'S LOYALTY TO BE TO YOU -
>
> **MR. VASSAR:** THAT'S WHAT I WANT.

THE COURT: NOW, YOU UNDERSTAND HOW THOSE CONFLICTS CAN ARISE IN THE CONTEXT OF THIS CASE WITH MR. MONCIER REPRESENTING HAROLD GROOMS AND REPRESENTING YOU AT THE SAME TIME?

MR. VASSAR: I UNDERSTAND.

THE COURT: OKAY. IT'S A VERY SIMPLE QUESTION THEN, UNDERSTANDING HOW THOW CONFLICTS CAN ARISE, DO YOU WANT MR. MONCIER TO CONTINUE REPRESENTING YOU IN THIS CASE OR DO YOU WANT ME TO EE IF I CAN FIND SOMEBODY WHO HAS NO CONNECTION WITH ANY OTHER CODEFENDANT OR PTENTIAL CODEFENDANT IN THIS CASE?

MR. MONCIER: ONCE AGAIN, YOUR HONOR -

THE COURT: MR. MONCIER -

MR. MONCIER: HE MAKES-

THE COURT: MR. MONCIER, YOU BE QUIET.

MR. MONCIER: MAY I APPROACH THE BENCH?

THE COURT: YOU MAY STAND THERE AND DO WHAT I TOLD YOU TO DO UNTIL MR. VASSAR ANSWERS THIS QUESTION.

MR. MONCIER: FOR THE RECORD, YOUR HONOR, I OBJECT WITHOUT HIM HAVING -

THE COURT: MR. MONCIER, ONE MORE WORD AND YOU'RE GOING TO JAIL.

MR. MONCIER: MAY I SPEAK TO MY-

THE COURT: OFFICERS TAKE HIM INTO CUSTODY. WE'LL BE IN RECESS.

APPLICABLE LAW

Federal courts have inherent powers necessary for them to function as an institution. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S. Ct. 2123, 115 L.Ed. 2d 27 (1991). "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates." *Id.* (quoting *Anderson v. Dunn*, 6 Wheat. 204, 227, 5 L.Ed. 242 (1821)).

"Criminal Contempt is a crime in the ordinary sense, *Bloom v. Illinois,* 391 U.S. 194, 201, 88 S. Ct. 1477, 1481, 20 L. Ed. 2d 522 (1968), and must be proven beyond a reasonable doubt. *Gompers v. Buck's Stove & Range Company*, 221 U.S. 418, 444, 31 S. Ct. 492, 499, 55 L.Ed. 797 (1911). The judicial contempt power,

however, should be exercised with restraint and discretion. *Railroad Express, Inc. v. Piper,* 447 U.S. 752, 764, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1980). The traditional power of a court to punish contempt is codified at 18 *U.S.C.* § 401, which provides as follows:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as -
>
> 1. Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> 2. Misbehavior of any of its officers in their official transactions;
>
> 3. Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

In order to support a conviction for criminal contempt under § 401(1), the record must establish, beyond a reasonable doubt, the existence of four (4) elements. First, there must be evidence that the defendant engaged in some conduct that can be considered "misbehavior." *See Vaughn v. City of Flint,* 752 F.2d 1160, 1167 (6th Cir. 1985). Second, that misbehavior must amount to an "obstruction of the administration of justice," *see id.*, an obstruction that "must be . . . actual, not . . .theoretical . . . ." *See id. at 1168 (citing In re McConnell,* 370 U.S. 230, 234, 82 S. Ct. 1288, 8 L. Ed. 2d 434 (1962)). Third, the contempt must occur in the presence of the judge imposing the

summary determination of criminal guilty.[2] *See id.* at 1167. Finally, the defendant must have formed an actual intent to cause the obstruction of justice. *See id.* Thus, the improper act must be "a deliberate or intended violation, as distinguished from an accidental, inadvertent or negligent violation." *Id.* at 1169 (quoting *TWM Manufacturing Company v. Dura Corp.*, 722 F. 2d 1261, 1272 (6th Cir. 1983)).

Section 401(3), on the other hand, requires proof beyond a reasonable doubt of (1) resistence or disobedience to the court's "writ, process, order, rule or command," and (2) the act of resistence or disobedience must be "a deliberate or intended violation, as distinguished from an accidental, inadvertent or negligent violation." *In re Chandler*, 906 F. 2d 248, 250 (6th Cir. 1990)(quoting *TMW Manufacturing Company*, 722 F. 2d at 1272). The second requirement may be "inferred if a lawyer's conduct discloses a reckless disregard for his professional duty." *U.S. v. Delahanty*, 488 F.2d 396, 398 (6th Cir. 1973).

Section 401(3), in contrast to § 401(1), requires no finding of obstruction of justice. Section 401(1) is predicated on "misbehavior" rather than the violation of an express order. *United States v. Galin*, 222 F. 3d 1123 (9th Cir. 2000). Also, the wisdom, fairness or correctness of a court's order is not at issue. "If a person to whom a court directs an order believes that order is incorrect that remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal."

---

[2] The record in this case may have provided an adequate basis for summary disposition on November 17 pursuant to Fed. R. Crim. P. 42(b); however, at the request of Moncier's counsel that the Court not do so, the Court chose to proceed after notice to Moncier, the appointment of a prosecutor and a trial after giving Moncier a reasonable time to prepare a defense. Rule 42(a).

Maness v. Meyers, 419 U.S. 449, 458, 95 S. Ct. 584, 42 L.Ed. 2d 574 (1975).

ANALYSIS, FINDINGS OF FACT AND CONCLUSIONS OF LAW

Criminal contempt of court is a very serious matter and, when the alleged contempt involves the conduct of an attorney appearing before the court, even more serious. In addition, the decision whether a criminal defense lawyer's actions are contemptuous requires this Court to balance two very important considerations -- the lawyer's duty to represent a criminal defendant vigorously and zealously and the court's duty to administer justice in an orderly and efficient fashion without contumacious interference by a misbehaving attorney. This balancing of policy considerations becomes even more difficult when dealing with a lawyer like Moncier, an attorney who by his own admission "pushes the envelope"[3] and who is described by his own attorney as a lawyer who will pursue every issue "to the line."[4]

Also important to this Court in determining the issues raised by this matter is the context in which the incident of November 17, 2006, occurred. It is unlikely that this Court, and most other courts, would have taken the extraordinary step of citing Moncier for contempt if the incident of November 17 had been an

---

[3] The role of a trial attorney representing a criminal defendant is necessarily contentious, made so by the adversary nature of a criminal proceeding. A criminal attorney nevertheless has a duty to conduct himself in a professional and dignified manner.

[4] Presumably the line between zealous advocacy and contemptuous conduct.

isolated one.[5] It was not, however. The transcript of the November 17 hearing establishes that Moncier had interrupted the Court no fewer than 14 times during the November 17 proceedings before the Court's order to Moncier to say not one more word. In addition, this case must also be considered in the context of Moncier's long experience in the defense of criminal cases in the federal courts. Moncier has practiced law for 38 years and his actions of November 17, 2006, cannot be viewed as the innocent mistake of a young, inexperienced lawyer or as an aberrant act. Although Moncier's actions on November 17 were decided in a "split second", his decisions were made in the context of a long career of trying cases and dealing with judges and courts under circumstances where decisions and judgments often must be made immediately and without the luxury of extensive forethought.

Use of the court's criminal contempt power should be made sparingly and then exercised only with great restraint. This is especially true where the alleged contemnor is an attorney because of the need to balance the competing policy concerned referenced above. The Court has never made a finding of contempt in any case, much less that of an attorney. Dealing with this case is perhaps the most unpleasant duty of the undersigned since assuming the bench; however, this Court has a clear duty to preserve the institutional integrity of the Court and to assure that the Court's duties are carried out through proceedings which are fair and which are conducted with decorum.

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[5] The is not to suggest that a contemnor must engage in repeated contemptuous misbehavior before he may be held in contempt, only that most judges show considerable restraining in dealing with isolated acts of misbehavior. The U.S. Supreme Court expressly rejected a multiple violation requirement in *Pounders v. Watson*, 521 U.S. 982 (1997).

Taking the monumental step of accusing an attorney of criminal contempt is an act of last resort and, in the Court's view, should be used only after all other efforts have been exhausted to assure the offending lawyer's compliance with the applicable rules of professionalism and civility. Those efforts had already been exhausted with Moncier. Throughout the course of Moncier's appearances before this Court, this Court has admonished Moncier for a wide range of misconduct, has lectured him concerning the Court's expectations as to professionalism and civility and has threatened him with a finding of contempt on prior occasions, all to no avail. This case, ultimately speaking, presents a very simple issue of whether the presiding judicial official will control the course of the proceedings in the courtroom or whether contumacious lawyers will be permitted to take control.

Analysis under Section 401(1)

As set forth above, four elements must be established beyond a reasonable doubt before the defendant may be convicted of criminal contempt under § 401(1): (1) misbehavior, (2) amounting to an obstruction of justice, (3) in the presence of the court, and (4) with the actual intent to obstruct justice. Each of these elements will be discussed in turn in the context of the evidence in this case.

Misbehavior

Almost any inappropriate act or comment by a lawyer in legal proceedings could be deemed "misbehavior" and the appellate courts have never precisely defined what constitutes sufficiently egregious misconduct but rather have focused on a "range of contumacious conduct disruptive of judicial proceedings." *Pounders*, 521 U.S. at 991. Moncier's

conduct in this case, however - *i.e.* repeatedly interrupting the court after a warning not to do so and in disobedience to the court's directive commanding his silence - is a clear case of misbehavior as contemplated by the statue and is well within "the range of contumacious conduct disruptive of judicial proceedings and damaging to the court's authority" punishable as criminal contempt. *Id.*

The Court FINDS, beyond a reasonable doubt, that this element of the offense has been established by the proff in this case.

Obstruction of Justice

The United States Supreme Court has stated the question as to this element to be whether the proof establishes that the misbehavior "obstructed the district judge in the performance of judicial duty." *In re McConnell*, 370 U.S. 230, 234, (1962). "Such obstruction necessarily involves an "act that will interrupt the orderly process of the administration of justice, or thwart the judicial process.' *United States v. Warlick*, 742 F. 2d 113, 116 (4th Cir. 1984). Thus, the government must show "that the defendant's acts delayed the proceedings, made more work for the judge, induced error or imposed unnecessary costs on the other parties." *Am. Airlines, Inc. v. Allied Pilots Ass'n.*, 968 F. 2d 523, 532 (5th Cir. 1992). At a minimum, the defendants misconduct must have "had an effect on the proceedings, which presupposes a cause triggered by the attorney's acts." *Id.* (citing *United States v. Oberhellmann*, 946 F. 2d 50, 52 (7th Cir. 1991)) *United States v. Meacham*, 65 Fed. Appx. 529, 535 (6th Cir. 2003)(Daughtrey, J. dissenting).

Although Moncier argues that he lacked the intent to obstruct justice (discussed below), he has not

seriously disputed that his action on November 17, 2006, had a disruptive effect on the proceedings and resulted in a delay of those proceedings. One point raised by Moncier, however, does bear some discussion here. Moncier has asserted through his testimony at trial and in an affidavit filed in support of his pre-trial motion to dismiss that the Court had no right to question his client (i.e. the Rule 44 did not permit the Court's questions), that he had no idea why the Court was asking questions (except possibly to "clean up the record") and that his client had communicated to him through eye contact and body language that he wished to talk to him before answering the Court's questions. Such assertions by Moncier lack any credibility.

As the transcript of the November 17, 2006, proceeding reflects, it was Moncier himself who suggested to the Court that there existed "an issue that pertains to Rule 44(c)." [Doc. 688, page 2]. The issue had arisen, according to Moncier, because the United States had provided him, on the day before the sentencing hearing, information relating to a statement made by a co-conspirator attributing to Vassar a potentially incriminating statement about another of Moncier's clients, an unindicted co-conspirator. Moncier then attempted to convince the Court to refer the matter to another district judge fore hearing and have independent counsel appointed to advise Vassar about Moncier's possible conflict of interest. Moncier asserted, during the hearing, that his client, Vassar, wasn't going to tell (Moncier) if he had made the statement because of his representation of the other client. [Doc. 683, page 43].[6] Moncier wanted Vassar to have the benefit of

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[6] This episode illustrates the extent to which Moncier's behavior on November 17 was out of control. After making the statement that "[H]e (Vassar) isn't going to tell me (Moncier) if Harold Grooms said that because he knows I represent Harold Grooms," (Doc. 683, p.43), Moncier was asked by the Court: "Mr.

independent counsel's advice on whether to cooperate with the government concerning the contents of the alleged statement in order to seek a motion for downward departure for his assistance. After the government indicated that it had no interest in debriefing Vassar, the Court denied both requests.

After further attempts to delay the sentencing haring, Moncier informed the Court that Vassar had told him during a recess that Vassar did not want him [Moncier] to be disqualified [Doc. 683, p. 78], that he [Moncier] did not "have a conflict", [*Id*, p. 88] and that Vassar wanted to address the Court. [*Id*. pp. 88, 89][7] Moncier specifically represented that if he could have the lunch hour to work with his client, he would be ready to proceed with the sentencing hearing at 1:30 p.m. The United States announced that it did not oppose the proceeding going forward with Moncier representing Vassar "if Mr. Vassar represents . . . to the Court that he wishes Moncier to continue as his counsel for this sentencing hearing." [*Id*., pp. 93-94]. Just minutes later, the Court asked Vassar to step to the podium and began to question him with regard to whether he wanted Moncier to continue as his attorney. It was shortly after that questioning began that the above exchange too place, leading to this proceeding.

Moncier's insistence that rule 44 did not permit the Court to question Vassar or that he did not know what the Court was doing is patently absurd and simply not credible in view of the events of November 17. Rule

---

Moncier, do you know what you just said to me? Moncier's answer was: "No." (Doc. 683, p.44).

[7] Throughout the November 17, hearing, Moncier repeatedly requested the Court to perform an inquiry or to permit Vassar to address the Court, which makes Moncier's assertions that he "had no idea" why the Court was inquiring of Vassar even more baffling.

44 in fact required the Court ("the court must promptly inquire. . .") to question Vassar about the possible conflict of interest called to the attention of the Court by his attorney. The Court would have simply ignored its responsibility to have done otherwise. *See Moss v. United States*, 323 F. 3d 445, 471 (6th Cir. 2003)(". . . a trial court has the duty to inquire adequately into a trial counsel's conflict of interest if it knows or reasonably should know that a particular conflict exists.") Also, in light of Moncier's repeated requests to the Court to question Vassar or to allow Vassar to address the Court, as well as the government's assertion just minutes before that the Court should determine if Vassar wanted Moncier to continue as his attorney, Moncier's assertion that he did not have any idea why Vassar had been called to the podium lack any credibility.

Moncier's claim that he knew Vassar wanted to speak to him is likewise incredible. For one thing, Moncier testified that he made his observation upon Vassar being called to the podium, yet, he made no request to consult with his client during a lengthy exchange between the Court and Vassar (taking up eight pages of transcript (pages 99-106) and including efforts by Moncier to persuade the Court to rephrase its questions), all of which occurred after Vassar was called to the podium. Secondly, Moncier's testimony that it was obvious during the proceeding at the podium that Vassar wanted to talk with him conflicts with both the transcript and with the Court's own observations. At no time during these proceedings did Vassar ever request time to consult with Moncier.[8] During the entire

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[8] Such a request would likely have been granted and would not have violated the Court's command to Moncier for silence. Michael Vassar was not unfamiliar with the court system nor with a Rule 44 inquiry. The inquiry of November 17 was the third Rule 44 inquiry conducted with Vassar due to concern about Moncier's simultaneous representation of Vassar and other clients.

proceeding at the podium, Vassar listened intently to the Court's questions and made direct eye contact with the Court. Vassar never exhibited confusion but rather affirmatively acknowledged the Court's inquiry and his understanding of the inquiry.

The Court FINDS, beyond a reasonable doubt, that this element of the offense has been established by the proof in this case.

In the presence of the Court

The record establishes clearly that Moncier's misbehavior occurred in the presence of the Court. The Court FINDS, therefore, beyond a reasonable doubt,

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While the right of a criminal defendant to the advice of counsel is well established, Moncier's insistence that he had an unlimited duty and right to speak to is client is misplaced. Moncier's testimony at trial that he was only trying to protect his client's constitutional rights by interrupting the Court's questions and intended to advise his client not to waive any potential conflict of interest by Moncier directly conflicts with Moncier's representation on November 17 hat his client wanted to proceed with the sentencing hearing represented by Mr. Moncier, that he did not want Moncier disqualified and that Moncier would be ready to proceed with the hearing at 1:30 p.m.

Moncier's trial testimony also appears to contradict his pre-trial affidavit where he seems to suggest that his true motivation was that he did not want Vassar to answer the Court's question because "clients in criminal cases should never answer questions prior to being advised as to what questions they are going to be asked and them being advised as to the purpose for the question and whether my client should respond." [Doc. 10-3, para 18]. Moncier cites no authority for such a view of the bounds of proper advocacy. A criminal defense attorney has no absolute right to interrupt proceedings whether conducted by adversary counsel during cross examination or by the court to advise a client how or whether to answer a question.

that this element of the offense has been established by the proof in this case.[9]

Actual intent to obstruct justice

The key question in this case is not whether Moncier's misbehavior obstructed justice (it id) but rather whether he acted with the actual intent to obstruct justice. Moncier testified unequivocally that he did not. As stated by the Sixth Circuit, the improper act must be a "deliberate and intended violation, as distinguished from an accidental, inadvertent or negligent violation." *Vaughn*, 752 F.2d at 1169 (quoting *TWM Mfg. Co. v. Dura Corp.*, 722 F.2d 1261, 1272 (6th Cir. 1983)). The Seventh Circuit has stated the standard for judging the minimum requisite intent for criminal contempt:

> The minimum requisite intent is . . . defined as a volitional act done by one who knows or should reasonably be aware that his conduct is wrongful . . . . Of course, an actual design to subvert the administration of justice is a more grievous and perhaps more culpable state of mind, but proof of such an evil motive is unnecessary to establish the required intent.

United States v. Seale, 461 F.2d 345, 368-69 (7th Cir. 1972).

Moncier's misbehavior in this case was clearly intentional but the question is: Was it done with actual intent to obstruct justice? Determining one's intent is

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[9] This element usually applies in a summary contempt proceeding. See footnote 2 above.

never easy[10] but I find that the record clearly establishes that Moncier acted with the intent to interrupt the orderly process of the administration of justice and to thwart the judicial process. First of all, Moncier is a very experienced criminal defense lawyer, having practiced for 38 years. His actions on November 17, 2006, therefore, cannot be viewed as the antics of or displaced aggressiveness of an amateur lawyer but rather as the calculated and deliberate acts of a wily veteran. He is not a novice at the practice of law and has handled hundreds of civil and criminal cases.[11] Simply put, Moncier's acts can be labeled neither accidental, inadvertent nor negligent.

Secondly, Moncier's own testimony reveals his motivation and his intent. Moncier testified at trial that he "could not, in good conscience, let the Court go forward and take a waiver from a defendant who did not fully understand the issue."[12] This testimony clearly illustrates Moncier's intent to prevent the sentencing hearing of Vassar from going forward on November 17. he had filed repeated motions for a continuance in the two weeks leading up to the hearing and appeared to be determined to prevent the hearing from going forward, and he appeared to be seizing upon whatever course of

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10 "[T]he question of one's intent is not measured by a psychic reading [the defendant's] mind but by the surrounding facts and circumstances." *United States v. Bolden*, 325 F.3d 471, 494 (4th Cir. 2003).

11 Moncier has tried five (5) criminal jury trials before this Court in the last three years.

12 This is not a direct quote but rather a paraphrase of Moncier's testimony at trial.

action occurred to him on November 17 to delay the proceedings.[13]

Thirdly, and arguably most importantly, determinations about a party's intent largely upon an assessment of his credibility and demeanor by the finder of fact. As set forth more fully above, I do not find much of Moncier's testimony credible nor are his explanations convincing.

Moncier's primary defense in this matter is that he was obligated by his duty to Vassar to seek clarification[14] of the Court's directive by asking to speak to his client in order to prevent harm to his client which would have occurred if Vassar had indicated that he wished to continue to have Moncier to represent him in spite of the potential conflict of interest on Moncier's part. In other words, Moncier argues that he was attempting to prevent Vassar from waiving his constitutional right to conflict free counsel.

This is a position adopted and advanced by the Tennessee Association of Criminal Defense Lawyers ("TACDL") as well.[15] TACDL argues that Moncier has

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[13] So strong was Moncier's determination not to go forward with the sentencing hearing on November 17 that he, at one point, "threatened" to stand mute during the sentencing hearing of his client.

[14] Although Moncier characterizes his conduct as an effort at clarification, it cannot reasonably be characterized as much.

[15] TACDL was granted leave to file an *amicus curiae* brief in this case. While the Court welcomes TACDL's view on these issues because of its focus and potentially special insight, the Court was disappointed by the superficial knowledge and treatment of the issue before the Court. First of all, the TACDL brief mistakenly states that Moncier was charged with criminal contempt for requesting permission to speak with his client. That simply is not the case. Secondly, the TACDL motion acknowledges that its brief

both a constitutional and ethical responsibility to interrupt the Court's questioning of Vassar after being instructed not to do so in order to preserve Vassar's constitutional rights, i.e, his Sixth Amendment right to effective and conflict fee counsel. TACDL further argues that to construe Moncier's acts a criminal contempt, "then the court will set a precedent that has a chilling effect on advocacy by the criminal defense bar in general, . . ."

As set forth above, an attorney must generally comply with the order of a court with jurisdiction to make the order, no matter how strong the attorney's disagreement with the order. That the court's order might be incorrect, tyrannical or "just plain idiotic" is no defense in a criminal contempt proceeding alleging disobedience of the order. "Lawyers are required to obey even incorrect order; the remedy is on appeal." *In re Dellinger*, 502 F. 2d 813, 816 (7th Cir. 1974). Trial judges are human and will not always be right. But trial counsel cannot be permitted to flout the rulings of the trial court regardless of how vehemently he disagrees with the ruling. *Comm. of Pa. v. Local Union 542*, 552 F. 2d 498 (3d Cir. 1997). The United States Supreme Court, even while recognizing a narrow

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was based soley on the notice of charges filed by the Court and that TACDL did not view Moncier's conduct in the context of the entire hearing of November 17, 2006.

The TACDL brief was signed by some of the preeminent criminal defense attorneys in Tennessee, several of whom have appeared before this Court. TACDL commendably advocates the fair and effective administration of criminal justice and this Court can only hope that the education and training provided by TACDL to its membership includes the promotion of professionalism and civility in the practice of law - matters which, quite frankly, should be addressed by bar associations and other professional associations of lawyers, not by the courts. This Court would also observe, based upon their conduct when appearing before this Court, that none of the attorneys who signed this brief on behalf of TACDL appear to view zealous advocacy in the same terms as Moncier.

exception to the general rule,[16] has emphasized the "basic proposition that all orders and judgments of courts must be complied with promptly." *Maness*, 419 U.S. at 458.[17]

As for the argument that holding Moncier in contempt would have "a chilling effect on advocacy by the criminal defense bar general", this Court disagrees. As stated by the Court of Appeals for the District of Columbia Circuit:

> "Zealous advocacy of a client's cause is never a legitimate excuse for disobeying a clear ruling of the court, and convicting an attorney of contempt for actual disobedience will not chill criminal defense attorneys from zealous advocacy within the bounds of the law."

In re Ellenbogen, 72 F. 3d 153 (D.C. Cir. 1995). Flouting a trial judge's commands is the very essence of obstruction of justice. *Local Union 542*, 552 F. 2d at 509.

Prior to assuming the bench, the undersigned regularly represented criminal defendants in both state and federal courts. This Court understands and subscribes to an attorney's duty in trying a case to be zealous and fearless in representing a client's interest. Every defendant is entitled to such advocacy on his behalf. The direct order of a trial judge, however, fixes

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16 An exception which has no application to this case.

17 The narrow exception found by the court in *Maness* dealt with a situation where a defendant was being required to relinquish his Fifth Amendment right against self incrimination, a result for which there was no appropriate remedy on appeal.

the limits of proper advocacy and the vigor permissible in representing a client's interest never includes the flouting of a judge's rulings. *See Dunn v. United States*, 388 F.2d 511, 513 (10th Cir. 1968); *In re Osborne*, 344 F.2d 611, 615 (9th Cir. 1965). Defiance and disobedience should not be confused with zealousness or vigorous advocacy.

Moncier's insistence that his duty to his client required his defiance of the Court is misplaced. If this Court acted arbitrarily in commanding silence from Moncier and failed to grant him reasonably opportunity to argue his position to the detriment of his client, then the court of appeals would have reversed.[18] And even if Moncier subjectively believed that his actions were necessary to preserve issues for appellate review[19] (which he has not claimed) such belief does not excuse direct violation of a direct order of the trial judge. 552 F.2d at 507; *Halliman v. Untied States*, 182 F.2d 880 (9th Cir 1950), *cert. denied* 341 U.S. 952 (1951).

In short, someone must be in control of what happens in a courtroom and maintain proper decorum. That person is the trial judge, not the lawyer for a criminal defendant nor the lawyer for the United States.

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[18] Moncier does not attempt to show any irreparable harm to Vassar which might have occurred had he complied with the Court's command for silence. It is only the order which requires "an irrevocable and permanent surrender of a constitutional right" which cannot be enforced by the contempt power. *Maness*, 419 U.S. at 460; *In re Grand Jury Proceedings*, 601 F.2d 162, 169 (5th Cir. 1979). Moncier's counsel tacitly acknowledged that Moncier was not attempting to protect Vassar from the irrevocable surrender of a constitutional right.

[19] Moncier had already stated his objection to the Court's procedure. But even if the Court prevent Moncier from adequately stating his objection, it is well established that an appellate court will not find a waiver of the objection under such circumstance.

Otherwise, the courts lose their ability to administer justice in an orderly fashion. "[T]he trial judge must have the authority necessary to insure the orderly and expeditious progress of the proceedings. His directives in the exercise of this authority must be obeyed; otherwise the clear result would be courtroom chaos." *United States v. Seale*, 461 F. 2d at 371 (7th Cir. 1971). An attorney who pursues a course that he deems to be in the best interest of his client and deliberately disregards a direct and explicit order of the trial judge offends the dignity and authority of the court and obstructs justice. *Id.* That Moncier might have acted in subjective good faith and without disrespect does not negate his intent. He acted willfully and with full knowledge that the Court would consider his actions contemptuous. He was explicitly told so.

The Court FINDS, beyond a reasonable doubt, that this element of the offense has been established by the proof in this case.

Having found all of the elements of the offense of criminal contempt pursuant to 18 U.S.C. § 401(1) to have been established beyond a reasonable doubt, I therefore FIND Herbert S. Moncier GUILTY of criminal contempt.

Analysis under Section 401(3)

Although the record establishes Moncier's guilt pursuant to 18 *U.S.C.* § 401(1), the Court will alternatively consider defendant's conduct under § 401(3). As set forth above, § 401(3) requires proof beyond a reasonable doubt of (1) resistance or disobedience to the court's lawful[20] order or command

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20 The order is lawful if made by a court having subject matter jurisdiction over the case and personal jurisdiction over the parties.

and (2) the act of resistance or disobedience was intentional or willful.

Disobedience to the Court's order or command

On November 17, 2006, Moncier received a direct, unequivocal command for silence and that he not further interrupt the Court's inquiry. The issue in this case is not whether the order was a proper or correct order. Other judges might well disagree with or find improper the order issued by the Court. Regardless, however, Moncier had the duty to obey the Court's order. *See Maness*, 419 U.S. at 459 (stating that an order by a court with jurisdiction, particularly during trial, "must be complied with promptly and completely" until reversed). He has not seriously contested the lawfulness of the order[21] or his disobedience of it. This element of the offense is established, beyond a reasonable doubt, from the proof in this case.

Intent

The crucial question, here, as with Moncier's intent to obstruct justice, is whether he acted willfully and intentionally in violating the Court's order. For may of the same reasons which led the Court to conclude that he acted with the intent to obstruct justice, the Court FINDS beyond a reasonable doubt that Moncier's

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Maness, 419 U.S. at 459. As set forth below, Moncier does not contest either subject matter or personal jurisdiction.

21 Although some suggestion was made by Moncier's counsel during the trial that this Court's order was unlawful, counsel acknowledged, in response to the Court's question, that this Court clearly had both subject matter and personal jurisdiction and there is, therefore, no question as to the lawfulness of the Court's order.

violation of the Court's order was willful and intentional.

The Court likewise FINDS, therefore, that Moncier is also GUILTY of criminal contempt in violation of 18 U.S.C. § 401(3).

CONCLUSION

This Court heard proof in this case on April 24, 2007 and was prepared to rule at the conclusion of that proof; however, since the case involves such an important issue; the matter was taken under advisement for further careful and extended consideration. After considering the matter carefully and thoughtfully over the ensuing weeks, this Court has come to the regrettable and unfortunate conclusion that the proof establishes that Moncier is guilty beyond a reasonable doubt of criminal contempt under both subsections one and three of 18 *U.S.C.* § 401. The record in this case clearly establishes beyond a reasonable doubt that Moncier disobeyed the clear, unequivocal and lawful order of this Court and that he did so with the intent to obstruct the administration of justice and to interfere with the orderly conduct of this Court's proceedings on November 17, 2006.

While it would have been far easier and less time consuming for this Court to ignore Moncier's contemptuous conduct, to do so would be to encourage disobedience to lawful court orders. The ability of this Court - indeed, all courts - to compel obedience to its orders is fundamental to its proper function. For the Court to turn its head to Moncier's conduct would likewise further erode the respect of the public for the bar, the vast majority of whom take seriously "the process of an orderly trial, which are the supreme object of the lawyer's calling." *Sacher v. United States*, 343

U.S. 1 (1952). The vast majority of lawyers vigorously represent their clients and understand that zealous representation of a criminal defendant does not include deliberate defiance of a judge's direct and explicit orders. Moncier's deliberate and continued interruption and argument with the rulings of the court and his unprofessional and contumacious conduct must cease; otherwise, the Court surrenders control and independence of the proceedings to lawyers who "equate contempt with courage." *Id.* This Court is unwilling to do so.

Sentencing in this matter is set for August 27, 2007, at 9:00 a.m. This matter is referred to the United States Probation Office for the preparation of a presentence report, as requested by the defendant. Sentencing proceedings in this matter will be conducted in accordance with LR 83.9.

The offense is punishable by an appropriate fine or by a term of imprisonment. The sentencing guidelines do not suggest a guideline range for this type of criminal contempt, *see U.S. Sentencing Guidelines Manual* Section 2J1.1 (2006); however, as indicated by this Court's prior rulings in this matter, the Court will consider a term of imprisonment not to exceed six (6) months and will consider all of the factors set forth in 18 U.S.C. § 3553(a) in determining an appropriate sentence in this case. Not later than August 13, 2007, each of the parties shall file with this Court a sentencing memorandum which addresses the relevant factors set forth in 18 U.S.C. § 3553(a) as well as any argument the party wishes to make as to an appropriate sentence. A copy of this sentencing memorandum shall also be supplied to the Probation Officers.

SO ORDERED.

ENTER:

s.J. RONNIE GREER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
GREENEVILLE

UNITED STATES OF AMERICA, .
.
GOVERNMENT .
.
VS. .
.
HERBERT S. MONCIER .
.
DEFENDANT .

DOCKET NO. 2:07-CR-40

GREENEVILLE, TN
AUGUST 27, 2007
9:45 A.M.

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE J.
RONNIE GREER UNITED STATES
DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT:

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RALPH E. HARWELL, ESQ.
RALPH E. HARWELL P.C.
800 GAY STREET
2131 PLAZA TOWER
KNOXVILLE, TN 37929

COURT REPORTER:

KAREN J. BRADLEY
RPR-RMR
U.S. COURTHOUSE
220 WEST DEPOT STREET
GREENEVILLE, TN 37743

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY, TRANSCRIPT PRODUCED BY COMPUTER.

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I FULLY UNDERSTAND, AS YOU POINT OUT IN YOUR SENTENCING MEMORANDUM, THAT YOU BELIEVE YOU WERE DOING NOTHING MORE IN THIS CASE THAN REPRESENTING THE INTEREST OF YOUR CLIENT. AND I HIGHLIGHTED WHEN I READ YOUR SENTENCING MEMORANDUM ONE OF THE QUOTES THAT YOU'VE USED BEFORE WITH THIS COURT, AND IT'S A QUOTE DIRECTLY FROM A CASE THAT'S I'VE READ, WHICH SAYS, ATTORNEY HAVE A RIGHT TO BE PERSISTENT, VOCIFEROUS AND IMPOSING, EVEN TO THE POINT OF APPEARING OBNOXIOUS, WHEN ACTING IN THEIR CLIENT'S BEHALF.

I DON'T KNOW WHERE THIS ATTITUDE THAT LAWYER IS JUSTIFIED IN DOING JUST ANYTHING TO REPRESENT THE INTEREST OF HIS CLIENT CAME FROM. I DON'T KNOW WHAT LAW SCHOOL IS TEACHING THAT, BUT THAT IS NOT NOW NOR HAS IT EVER BEEN THE ACCEPTED AND THE PROFESSIONAL WAY OF DOING THINGS IN A COURTROOM.

AS YOU AND I HAVE TALKED BEFORE, THERE ARE BOUNDARIES THAT ARE SET, THERE ARE LINES THAT ARE DRAWN BY THE PERSON WHO IS IN CONTROL OF THE PROCEEDINGS, THAT BEING THE JUDGE. AND WHETHER YOU AGREE OR DISAGREE WITH WHERE THOSE LINES HAVE BEEN SET, REPRESENTATION OF THE INTEREST OF YOUR CLIENT DOES NOT JUSTIFY STEPPING ACROSS THAT LINE OR KICKING SAND IN THE FACE OF THE JUDGE BY BLATANTLY DISOBEYING A DIRECTIVE OF THE COURT.

A SIMPLE STATEMENT, JUDGE I MADE A MISTAKE, I'M

SORRY, WOULD HAVE ENDED THIS MATTER A LONG TIME AGO, BUT FOR SOME REASON, MR. MONCIER, YOU'RE NOT ABLE TO SAY THOSE WORDS. YOU'RE NOT ABLE TO SAY. I MADE A MISTAKE.

I DON'T WANT TO IMPOSE ANY SENTENCE IN THIS CASE. YOUR LAWYER HAS NOW SUGGESTED TO ME THAT PROBATION IS NOT AN OPTION, WHICH LEAVES ME BUT TWO CHOICES, A FINE OR A TERM OF IMPRISONMENT. THE FINE

I'M LIMITED TO IN THIS CASE MEANS NOTHING TO YOU, SO YOUR LAWYER IS BASICALLY TELLING ME TO CHOOSE BETWEEN SENDING YOU TO PRISON OR NOTHING.

WHEN I THINK ABOUT THE REASONS FOR IMPOSING A SENTENCE IN THIS CASE, OR NECESSITY I HAVE TO LOOK TO 3553(A). AND SOME MIGHT ARGUE THAT THIS IS NOT A SERIOUS OFFENSE, A DEFIANCE OF A JUDGE'S ORDER, THE WILLFUL DISOBEDIENCE OF A JUDGE'S ORDER IS NOT A SERIOUS MATTER. WELL, IT'S NOT A VIOLENT CRIME. IT DOESN'T CARRY WITH IT THE POTENTIAL FOR INJURY OR DEATH THAT THE PRIOR CASE DID, FOR INSTANCE. IT'S NOT A DRUG TRAFFICKING OFFENSE. IT DOESN'T CARRY WITH IT THE POTENTIAL OF HARM OR INJURY TO PEOPLE IN SOCIETY THAT THOSE KINDS OF OFFENSES CARRY; BUT IT IS AN OFFENSE, MR.MONCIER, THAT STRIKES AT THE VERY HEART OF OUR SYSTEM OF JUSTICE. IT IS THE KIND OF OFFENSE THAT ADDS TO AN CREATES IN THE FIRST INSTANCE THE PUBLIC'S DISTRUST OF THE LEGAL SYSTEM.

IT'S NOT AN OFFENSE, IN OTHER WORDS, THAT I FEEL

. . . . . .

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
GREENEVILLE

UNITED STATES OF AMERICA, .
.
GOVERNMENT .
.
VS. .
.
MICHAEL VASSAR, .
.
DEFENDANT .

DOCKET NO. CR-2-05-75

GREENEVILLE, TN
NOVEMBER 17, 2006
9:05 A.M.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE J.
RONNIE GREER UNITED STATES
DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT:

U.S. ATTORNEY'S OFFICE

FOR THE DEFENDANT:

HERBERT S. MONCIER, ESQ.

COURT REPORTER:

KAREN BRADLEY

RPR-RMR
U.S. COURTHOUSE
220 WEST DEPOT STREET
GREENEVILLE, TN 37743

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY, TRANSCRIPT PRODUCED BY COMPUTER

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OR DO YOU WANT ME TO SEE IF I CAN FIND SOMBEDOY WHO HAS NO CONNECTION WITH ANY OTHER CODEFENDANT OR POTENTIAL CODEFENDANT IN THIS CASE?

MR. MONCIER: ONCE AGAIN, YOUR HONOR --

THE COURT: MR. MONCIER --

MR. MONCIER: HE MAKES --

THE COURT: MR. MONCIER, YOU BE QUIET.

MR. MONCIER: MAY I APPROACH THE BENCH?

THE COURT: YOU MAY STAND THERE AND DO WHAT I TOLD YOU TO DO UNTIL MR. VASSAR ANSWERS THIS QUESTION.

MR. MONCIER: FOR THE RECORD, YOUR HONOR, I OBJECTION WITHOUT HIM HAVING--

THE COURT: MR. MONCIER, ONE MORE WORD AND YOU'RE GOING TO JAIL.

MR. MONCIER: MAY I SPEAK TO MY --

THE COURT: OFFICERS, TAKE HIM INTO CUSTODY. WE'LL BE IN RECESS.

(RECESS AT 12:47 P.M.)

(END OF SEALED PROCEEDINGS)

* * * * * *

UNITED STATS OF AMERICA, Plaintiff-Appellee v. SHAWTE DEBAR PRICE, Defendant-Appellant.

No. 00-2399

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

30 Fed.Appx. 333; 2002 U.S. App. LEXIS 1065

January 23, 2002, Filed

PRIOR HISTORY: ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN. 00-00057. McKeague. 11-14-00.

DISPOSITION: AFFIRMED.

COUNSEL: For UNITED STATES OF AMERICA, Plaintiff - Appellee: Brian K. Delaney, Office of the U.S. Attorney for the Western District of Michigan, Grand Rapids, MI.

For SHAWTE DABAR PRICE, Defendant - Appellant: Richard E. Zambon, Mitchell & Zambon, Grand Rapids, MI.

JUDGES: BEFORE JONES and COLE, Circuit Judges; SARGUS, District Judge.* *The Honorable Edmund A. Sargus, Jr., United States District Judge for the Southern District of Ohio, sitting by designation.

OPINION BY: R. GUY COLE, JR.

OPINION

R. GUY COLE, Jr., Circuit Judge. This is an appeal from sentence in a contempt of court action. Defendant-Appellant Shawte Debar Price pleaded guilty to contempt of court, a violation of 18 U.S.C. § 401, [**2] for failing to obey a direct order to testify at the trial of Quincy Price, Defendant's brother. Because we agree with the district court that the obstruction of justice provision of § 2J1.2 of the U.S. SENTENCING GUIDELINES MANUAL (2000) is the most analogous to the facts in this case, we **AFFIRM** the judgment of the district court.

BACKGROUND

On May 11, 2000, a grand jury for the Western District of Michigan, Southern Division, returned a two-count superseding indictment naming Price as the sole defendant for being in contempt of court.

Previously, on December 4, 1997, Defendant and his brother, among others, were indicted for conspiracy to unlawfully distribute and possess with intent to distribute cocaine, cocaine base, and marijuana contrary to 21 U.S.C. § 841(a)(1). Defendant pleaded guilty pursuant to a plea [*334] agreement in which he agreed to cooperate with the prosecution and testify against other members of the conspiracy. Defendant received a three-level reduction in consideration for this agreement. Defendant ultimately testified before the grand jury.

Anticipating the need for Defendant to testify at the trial of his brother, the Government [**3] applied to the trial judge for an order requiring Defendant's testimony. On September 21, 1999, Judge McKeague signed the order, pursuant to 18 U.S.C. § 6002, directing Defendant to provide testimony at trial.

On January 6, 2000, the trial of Quincy Price commenced before Judge McKeague. On January 7, 2000, the Government called Defendant as a witness to provide testimony against his brother. Defendant answered preliminary questions, revealed to the jury that he had testified before the grand jury, identified his brother for the record, and acknowledges his guilty plea and current service in prison for cocaine distribution. However, Defendant refused to answer questions relating to his own or Quincy Price's involvement in illegal drug activity. Defendant asserted his Fifth Amendment privilege against self-incrimination as his reason for refusing to testify.

On January 11, 2000, the Government recalled Defendant to testify at the trial of Quincy Price and he again refused to answer any questions. Upon his continued refusal to answer questions, the court advised Defendant that his Fifth Amendment privilege was unavailable as a result of his immunity pursuant [**4] to 18 U.S.C. § 6002. The court ordered and directed Defendant to answer questions asked by the Government. The court also advised Defendant that his failure to answer questions could result in his prosecution for criminal contempt. Defendant retook the stand and maintained his silence.

The jury convicted Quincy Price of conspiracy to distribute and to posses with intent to distribute cocaine, cocaine base, and marijuana on January 14, 2000.

Thereafter, the grand jury indicted Defendant for contempt of court. On July 31, 2000, Defendant pled guilty to Count 2 of the superseding indictment pursuant to a written plea agreement. The pre-sentence investigator determine obstruction of justice, U.S.S.G. § 2J1.2, was the guideline appropriate for application in

this case. Section 2J1.2(c)(1) of the Guidelines refers the court to U.S.S.G. § 2X3.1 (Accessory After the Fact) if the "offense involved obstructing the investigation or prosecution of a criminal offense." Finding that defendant's failure to testify constituted such an obstruction, the probation officer applied § 2X3.1(a) to give Defendant a base offense level of 30. This was adjusted downward by three [**5] points under § 3E1.1 (Acceptance of Responsibility) for a total base offense level of 27. Accepting the probation officer's report, the district court sentenced Defendant to a hundred-month term.

Defendant objected to the use of § 2J1.2 and asserted that § 2J1.5 (Failure to Appear by Material Witness) was more closely analogous to the crime charged. The district court determined that the obstruction of justice guideline was most appropriate. This appeal follows.

DISCUSSION

STANDARD OF REVIEW

We review the district court's legal conclusions regarding the application of the Sentencing Guidelines *de novo*; however, we accept the district court's findings of fact unless they were clearly erroneous. *United States v. Gort-Didonato*, 109 F.3d 318, 320 (6th Cir. 1997).

SENTENCING GUIDELINE

The district court did not err in applying the Guidelines.

The guideline for contempt, § 2J1.1, directs the court to U.S.S.G. § 2X5.1 which instructs the court to apply the most analogous offense guideline. The district

court concluded that U.S.S.G. § 2J1.2 (Obstruction of Justice) was the most analogous offense guideline. The application notes to § 2J1.1 permit [**6] such a finding, stating that "in certain cases the offense conduct will be sufficiently analogous to § 2J1.2 (Obstruction of Justice) for that guideline to apply. "U.S.S.G. § 2J1.1, cmt. n.1.

The dispositive question is whether Defendant intended to obstruct justice or simply remain silent. *See United States v. Ortiz*, 84 F.3d 977, 981 (7th Cir. 1996). In order to show intent to obstruct justice, the Government must point to specific acts by the defendant resulting in the obstruction of justice, or otherwise show the defendant's conduct was designed to interfere with the administration of justice. *Id.*

In *Ortiz*, Manuel Hurtado, an immunized co-conspirator of Julio Ortiz, failed to answer fully the questions put to him by the Government, despite orders from the district court. The prosecution urged Hurtado be sentenced under the obstruction of justice provision of § 2J1.2 because he was acting as an accessory after the fact. *Id.* The Seventh Circuit held that Hurtado's refusal to testify at the trial of co-defendant Ortiz was motivated more by an aversion to being known as a "snitch or an informer" than by a desire to aid Ortiz. *Id.* The Title 18, section [**7] 3, of the United States Code defines an accessory after the facts as a person who, "knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment." The court concluded it was impossible for Hurtado to be guilty of this crime, considering he was incarcerated during the period of time in question, and found the failure to appear guideline more appropriate. *Id.* at 982. However, the court finished its analysis by stating, "This is not to say that the failure to appear guideline must be

used by analogy in all cases involving criminal contempt citations stemming from a failure to testify. in some situations, the use of other guidelines--obstruction of justice and accessory after the fact, to name two--might be better fits." *Id.* at 982.

In this case, the Government pointed to enough specific acts to allow the district court to conclude that the defendant intended to obstruct justice by not testifying. Price had previously decided to enter into a plea agreement with the Government in exchange for full cooperation. he had already [**8] supplied critical information before a grand jury during which he indicated his criminal dealings with co-conspirators. he refused to testify after having received considerable benefits, including a three point reduction on his sentence for cooperating with the Government. Furthermore, he refused to testify at trial only after his brother had been apprehended and the brothers had had an opportunity to talk. As the district court remarked:

> This is not the instance of a defendant simply appearing and sitting in the back of the courtroom and then refusing to testify. . . This is a case where, in order to further his own situation, Mr. Shawte Price decided . . . that it was in his best interests to enter into a plea agreement to testify before a grand jury, including testimony unfavorable to his own brother. It appears that only after his brother was arrested, incarcerated, and they had a chance to talk that [*336] he decided that blood was thicker than a plea agreement . . . .

JA at 162.

We agree with the district court. Instead *Ortiz*, we find this case presents itself more like *United States v. Brady*, 168 F.3d 574 (1st Cir. 1999). In *Brady*, the [**9] grand jury summoned an immunized Brady to testify against two other men in a robber and murder case. Brady refused to testify despite an order by the district court and subsequently pleaded guilty to criminal contempt. In the course of sentencing Brady, the judge discovered that Brady had been criminally involved with the other two defendants, and that he had substantial knowledge of their plans. As a result, the court employed the obstruction of justice offense level set forth in the accessory after the fact provision of the Guidelines. The First Circuit affirmed, holding that the district court could have concluded from the facts that Brady's refusal to testify was motivated, not by an abstract desire not to testify, but because he wanted to impede the investigation and protect his co-conspirators. *Id.* at 580. We find the facts in *Brady* more clearly analogous to the case at bar than *Ortiz*.

Other circuits support his reasoning by likewise applying U.S.S.G § 2J1.2 to contempt convictions. *See United States v. Marquardo*, 149 F.3d 36 (1st Cir. 1998) (Section 2J1.2 most analogous offense for criminal offense where defendant refused to testify [**10] before a grand jury); *United States v. Remini*, 967 F.2d 754 (2d Cir. 1992) (Section 2J1.2 most analogous offense for criminal contempt where immunized defendant refused to testify at trial of mob boss; the court rejected defendant's argument for application of § 2J1.5); *United States v. Voss*, 82 F.3d 1521 (10th Cir. 1996) (Section 2J1.2 was the most analogous guideline where the basis of contempt was defendant's violation of court order to produce records before a grand jury; the court rejected the defendant's argument for application of § 2J1.5).

CONCLUSION

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For the foregoing reasons, we **AFFIRM** the judgment of the district court.